(13)

No. 03-95

IN THE
Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner

v.

NANCY DREW SUDERS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. An Employer Should Be Allowed To Assert The Affirmative Defense When A Supervisor Creates A Hostile Work Environment Which Culminates In A Constructive Discharge. 1

A. As respondent concedes, an employee's claim of constructive discharge has no effect on whether a supervisor's creation of a hostile environment satisfies the aided-by-the-agency-relation standard. 1

B. Denying the affirmative defense in constructive discharge cases will create more problems than it will solve. 3

C. Respondent has offered no sound reason to overrule *Ellerth* and *Faragher*. 6

II. None Of The Actions Allegedly Taken Against Respondent Was A Tangible Employment Action. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) ..... passim
Faragher v. City of Boca Raton,
524 U.S. 775 (1998) ..... passim
Lindale v. Tokheim Corp.,
145 F.3d 953 (7th Cir. 1998) 5
Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 1, 6, 7
Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 7
Swiech v. Gottlieb Memorial Hosp.,
2000 WL 343244 (N.D. Ill. 2000) 5

ARGUMENT

I. An Employer Should Be Allowed To Assert The Affirmative Defense When A Supervisor Creates A Hostile Work Environment Which Culminates In A Constructive Discharge.

A. As respondent concedes, an employee's claim of constructive discharge has no effect on whether a supervisor's creation of a hostile environment satisfies the aided-by-the-agency-relation standard.

This case presents a question of vicarious liability, the resolution of which, as the Court has repeatedly held, depends upon principles of agency law — in particular, the principle that an employer is liable for its agent's torts when the accomplishment of those torts was aided by the existence of the agency relationship. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-760 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 801 (1998); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). In *Ellerth*, the Court held that an employer is strictly liable for a supervisor's "tangible employment actions" — hirings, firings, promotions, and so forth — because it is "beyond question," *id.*, at 761, that such actions satisfy the aided-by-the-agency-relation standard. *Id.*, at 761-763. The Court also made it clear, however, that strict liability is not appropriate for acts of harassment creating a hostile work environment, because (among other reasons) such acts do *not* clearly satisfy this standard. *Ellerth*, 524 U.S. at 763.

As we explained in our opening brief, this agency analysis of a supervisor's actions is not affected by a claim of constructive discharge. *See* Br. for Pet. 18-22.

Actions that would not otherwise satisfy the aided-by-the-agency-relation standard, are not converted into acts of agency just because an employee resigns in response to them. The agency question turns on the relationship *between the supervisor and the employer*, and actions of the employee are simply extraneous to that relationship. Thus, if a supervisor's creation of a hostile work environment does not clearly satisfy the aided-by-the-agency-relation standard — and as the Court explained in *Ellerth*, it does not — then this remains true whether or not that environment causes an employee to resign.

Respondent and her *amici* do not contest this central point; indeed, respondent explicitly concedes it. Br. for Resp. 21 ("petitioner [says] that the employees [sic] 'reaction' 'does not change the nature of the supervisor's actions for purposes of agency law.' Well of course it doesn't.") But apart from this concession, respondent and her *amici* virtually ignore the agency analysis which lies at the heart of *Ellerth* and *Faragher*, and which controls this case as well.

Instead, respondent and her *amici*, like the Court of Appeals, rely almost entirely on the idea that, because a constructive discharge is treated as the "functional equivalent" or the "legal equivalent" of an actual discharge in other contexts, it should be treated so here as well. *See* Br. for Resp. 10-11; Br. for Lawyers' Committee for Civil Rights under Law *et al.* as Amicus Curiae 11-17; Br. for AFL-CIO as Amicus Curiae 8-9; Pet. App. 50a. But while constructive discharges and actual discharges may resemble each other in some ways — particularly in their economic effect on employees — the two are not identical in all respects; and the ways in which they differ are precisely those which are most relevant to agency analysis. *See* Br. for Chamber of Commerce as Amicus

Curiae 12-13; Br. for Soc. for Human Resource Management as Amicus Curiae 20-21. First, a constructive discharge caused by a hostile environment is not an "act" of the employer at all, still less is it an "official act" which invokes the employer's authority; rather, it is an employee resignation which, however reasonable, is neither ratified nor approved by the employer. Second, the hostile environment which precipitates such a resignation can be created by co-workers as well as by supervisors, and the creation of such an environment thus by definition cannot be an action which falls within the "special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762. For purposes of the agency principles that underlie Title VII, then, a constructive discharge is quite different from an actual discharge.

B. Denying the affirmative defense in constructive discharge cases will create more problems than it will solve.

Amici on both sides have suggested that, because the *Ellerth/Faragher* affirmative defense overlaps with the defense of a constructive discharge on the merits, the affirmative defense may have little practical significance in such cases. *See* Br. for Equal Opportunity Advisory Council as Amicus Curiae 12-15; Br. for Lawyers' Committee for Civil Rights under Law *et al.* as Amicus Curiae 17-20. This, however, overstates the case: while the *Ellerth/Faragher* affirmative defense may sometimes duplicate the outcome of the merits inquiry, that is not necessarily or invariably so.

For example, most courts, in evaluating a constructive discharge claim, consider whether the employee, before resigning, attempted to resolve the

problem by using the employer's internal complaint or grievance procedures; and this, of course, closely resembles one element of the *Ellerth/Faragher* affirmative defense. But as the Court of Appeals made clear in this case, such evidence need not always be considered; indeed, the Court of Appeals actively discouraged district courts from admitting it as a matter of course:

> [District] courts should carefully weigh the relevance of evidence relating to an employer's antiharassment program.... In [some] cases, *some* evidence regarding an employer's antiharassment program or an employee's response to the alleged harassment *may* be admissible for the limited purpose of determining whether a constructive discharge has occurred. ...[W]e rely on the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether *all, some, or none* of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative avenues warrants introduction at trial.

Pet. App. 60a-61a (emphases added).

Even when they consider such evidence on the issue of a constructive discharge, courts do not always give it the same significance it would have in the context of the affirmative defense. For purposes of the affirmative defense, proof that the employee "unreasonabl[y] fail[ed] to use any complaint procedure provided by the employer" is ordinarily dispositive; such proof "will normally suffice to satisfy the employer's burden." *Ellerth*, 524 U.S. at 765. But in the constructive discharge context, that same proof may be regarded as simply one piece of evidence among others bearing on the issue of whether the

employee's working conditions were truly intolerable; its significance is merely "evidentiary." *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998) As the court said in *Lindale*, "[an employee's] failure to [complain] *may* be compelling evidence that he ... would not actually have found conditions ... unbearable," *ibid* (emphasis added), but then again it may not. *See Swiech v. Gottlieb Memorial Hosp.*, 2000 WL 343244, *4 (N.D. Ill. 2000) (applying *Lindale* to hold that evidence of failure to complain does not preclude claim, but must be weighed by jury).

Such considerations no doubt explain why none of the many courts of appeals which have considered the issue presented by this case have regarded it as meaningless — an oversight which would be remarkable if it were really true that proof of a constructive discharge, and proof of the *Ellerth/Faragher* affirmative defense, are always and necessarily "mutually exclusive." Br. for Lawyers' Committee for Civil Rights under Law *et al.* as Amicus Curiae 18. *Cf.* Pet. App. 4a (case presents issues "of critical importance to civil actions brought pursuant to Title VII"). But that is not true. At most, the affirmative defense may be superfluous in some cases of constructive discharge, and the Court will therefore do no doctrinal or practical harm by adopting the rule we have submitted.

A holding affirming the Court of Appeals, on the other hand, would create serious problems on both the theoretical and practical levels. Such a holding would mean that the identical actions by a supervisor either will, or will not, be regarded as having been aided by the agency relationship with the employer, depending entirely on whether an employee regards them as so intolerable as to justify resignation, and on whether a jury later agrees with that assessment — a

result which is impossible to square with principles of agency law in any coherent fashion. It would also mean that, in most cases, the availability of the affirmative defense will not be known until a jury resolves the matter, thus increasing the uncertainty, difficulty and cost of litigation. *See* Br. for Pet. 25. And last but certainly not least, such a holding would undermine the efforts of employers to prevent and correct sexual harassment, *see* Br. for Equal Opportunity Advisory Council as Amicus Curiae 21-22; and thus in turn undermine Title VII's "primary objective ... to avoid harm." *Faragher*, 524 U.S. at 806 (internal quotation marks omitted).

C. Respondent has offered no sound reason to overrule *Ellerth* and *Faragher*.

Finally, respondent invites the Court to overrule *Ellerth* and *Faragher* "to eliminate completely the affirmative defense." Br. for Resp. 23. Respondent's request — that the Court abandon the idea that employer liability is both limited and guided by principles of agency law, in favor of a rule of unlimited vicarious liability — would of course require that the Court overrule not only *Ellerth* and *Faragher*, but *Meritor* as well. *See id.*, 477 U.S. at 72 (Congress intended to place "some limits" on employer liability for supervisors' acts, and intended the courts "to look to agency principles for guidance"). Respondent, however, offers no sound reason for doing so.

First, considerations of *stare decisis* weigh heavily against respondent's suggestion. The rule established in *Meritor*, and elaborated upon in *Ellerth* and *Faragher*, is one of "statutory interpretation pursuant to congressional direction," *Ellerth*, 524 U.S. at 755, and in such cases the command of *stare decisis* is especially strong. *E.g.*, *Patterson v. McLean Credit*

Union, 491 U.S. 164, 172-173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for ... Congress remains free to alter what we have done"). And as the Court has already remarked, in *Meritor's* case "the force of precedent is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding." *Faragher*, 524 U.S. at 792; *accord Ellerth*, 524 U.S. at 763-764 ("Congress has not altered *Meritor's* holding even though it has made significant amendments to Title VII in the interim"). Respondent, however, simply ignores the role of *stare decisis*.

Second, respondent's request would lack merit even as an original matter. As the Court has pointed out, *Meritor's* invocation of agency principles is rooted in the text of Title VII itself, *see Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 754, and respondent does not even attempt to argue otherwise. *See* Brief for Resp. 23-24. Rather, her argument is policy-based: she argues that if employees could more easily win lawsuits, "the problem [of sexual harassment in the workplace] would shrink." Brief for Resp. 23. But this is at bottom just an attempt to alter the balance which Congress struck in Title VII — an attempt which the Court has already rejected:

> The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that ... Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so) would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

Faragher, 524 U.S. at 804 n. 4. The Court should therefore decline respondent's invitation.

II. None Of The Actions Allegedly Taken Against Respondent Was A Tangible Employment Action.

Respondent, and to a lesser extent the United States, suggest that respondent may have been subjected to tangible employment actions quite apart from the existence of a constructive discharge. The United States points to the actions of respondent's supervisors in "allegedly setting her up on a false charge of theft and engineering her arrest," and respondent adds to this three instances of minor disciplinary actions.[1] *See* Br. for United States as Amicus Curiae 28; Br. for Resp. 39. Even if these suggestions did not come too late, *see* Br. for Pet. 26-27, they would lack merit.

Whether or not the acts in question are what the United States calls "official acts," they would still not be "tangible employment actions" within the meaning of *Ellerth* and *Faragher*. The existence of an "official act of the company, a company act," *Ellerth*, 524 U.S. at 762, is a necessary but not a sufficient condition for a "tangible employment action"; otherwise, the term would encompass every routine use of supervisory authority to direct the day-to-day activities of employees. A "tangible employment action," however, is not merely an "official act," but an "official act" which effects "a significant change in employment status," typically accompanied by "direct economic harm." *Ibid.* Neither respondent nor the United States

[1] Respondent's brief does not supply any record citations for these incidents, but they appear to be those reflected at J.A. 88-90, 111 and 112-113 (Suders Dep.).

makes any claim that any of the incidents in question either changed respondent's employment status or inflicted any economic harm (except insofar as they contributed to her constructive discharge), nor is there any support in the record for such an assertion. There is therefore no need for a remand on this issue.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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